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No. 88-482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT E. HOWELL, BETTY CHAVEZ AND ERNEST SCHUMACHER, AS ADMINISTRATOR OF THE ESTATE OF RODNEY L. HOWELL,

DR. AND MRS. J. CRAYTON PRUITT, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MARK H. PRUITT,

CORINA K. YIN, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PAUL C. YIN,

CHARLES BOLAND, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ANN RENEE BOLAND AND CYNTHIA BOLAND,

Petitioners,

v.

UNITED STATES FIRE INSURANCE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

BRIEF OF RESPONDENT UNITED STATES FIRE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent United States Fire Insurance Company ("U.S. Fire")[1] respectfully submits this Brief in opposition to the Petition for Writ of Certiorari and for the reasons stated herein urges this

[1] U.S. Fire is a wholly owned subsidiary of Crum & Forster, Inc., which is a wholly owned subsidiary of Xerox Corporation.

Honorable Court to deny the Petition.

STATEMENT OF THE CASE

Petitioners have not supplied the Court with a full and correct statement of the case. U.S. Fire is therefore setting forth below its own statement of the case.

This litigation arises from the September 29, 1985 crash of a Cessna Caravan aircraft piloted by Steven Herbert Wilson ("Wilson"). [Second Supplemental Record, affidavit of Patricia Valley Ratermann, page 17, lines 21-23; R.402]. Respondent U.S. Fire had issued a policy of aircraft insurance to Air Carrier Express Services, Inc. covering the Cessna Caravan for certain specified risks, a copy of which policy is contained in the Record at pages 72-91. Following investigation, Respondent instituted this declaratory judgment action contending there was no coverage for the accident on the separate and independent grounds of fraudulent misrepresentations by the insured in applying for the insurance; submission of a fraudulent claim by the insured for an incident prior to the accident in question; fraudulent representations by the insured that the aircraft was not being used for parachuting; operation of the aircraft at the time of the accident by a pilot who did not meet the policy requirements; invalidity of the aircraft airworthiness certificate at the time of the accident; and exclusion of coverage for death of the named insured or a crew member. (R. 13-14.)

Only one of the grounds for lack of coverage was raised in a Motion for Summary Judgment in the trial court, namely, that pilot Wilson had not attended a Cessna approved flight and ground training course for the Cessna Caravan aircraft. (R.95.) The policy in question required that any pilot operating the aircraft be "a graduate of a ground and flight training school conducted by the manufacturer of the aircraft" (R.91) and excluded coverage when the aircraft was operated by a pilot not meeting such policy requirements. (R.73.) Because the undisputed facts demonstrated that the pilot had not attended

a Cessna approved flight and ground training course for the Cessna Caravan aircraft, the trial court correctly held that there was no coverage for any claims arising from the accident. (R.687.) That judgment was affirmed by the Georgia Court of Appeals. *Howell v. United States Fire Insurance Co.*, 185 Ga. App. 154, 363 S.E.2d 560 (1987). Although the Georgia Supreme Court initially granted certiorari to review the Georgia Court of Appeals' decision, the grant of certiorari was later withdrawn by the Georgia Supreme Court [(258 Ga. 338, _____ S.E.2d _____ (1988)], so that the Court of Appeals' decision became final.

Although Petitioners imply that at the time of the accident Air Carrier Express Services was operating the aircraft pursuant to its interstate air taxi registration, it is undisputed that such was *not* the case. The undisputed evidence shows that the flight in question originated at the Jenkinsburg, Georgia airport for the purpose of dropping parachute jumpers back onto that same airport. [Second Supplemental Record, Deposition of Patricia Valley Rattermann, p. 11, 1. 1-17]. It was therefore specifically exempted from the Air Taxi Regulations. See, 14 C.F.R. §135.1. The accident occurred during the takeoff from the airport and the entire intended flight path was totally within the State of Georgia. It is undisputed that the flight was therefore a totally intrastate operation.

Further, although a reading of Petitioners' Brief would suggest that the passengers on the parachute jump flight were carried as part of an interstate operation, such conclusion is *not* supported in the Record. Although Petitioners make the loose allegation that one passenger on board came from out of state with the intention of making the parachute jump, there is no evidence that he was transported from out of state by Air Carrier Express Services itself, or as part of an arrangement between Air Carrier Express Services and some other carrier. The fact is, he was simply a person from out of state, whose transportation to the jump site had no involvement with Air Carrier Express

Services. There is absolutely no evidence that Air Carrier Express Services at any time carried fare-paying passengers in interstate commerce for parachute jumping. The fact that in the past the aircraft may have been in different states where it dropped jumpers on local flights does not subject the accident flight to Air Taxi Regulations, as suggested by Petitioners. Simply put, the record does not contain any facts to support Petitioners' "interstate activity" claim.

Petitioners also did not disclose how any alleged "federal question" was supposedly injected into the litigation. As noted above, there is no coverage under the insurance policy in question because the pilot of the aircraft on the accident flight did not meet the policy requirements. That fact is undisputed. To avoid the consequences of the failure to meet policy requirements, Petitioners attempted to create a coverage issue based on the Economic Regulations contained in 14 C.F.R. §298.1. Petitioners have attempted to argue that the insurance policy itself was required to be submitted to the Department of Transportation and that no changes could be made in it without notice to the Department of Transportation. Alternatively, Petitioners have tried to argue that the exclusion in question was not permitted under the Economic Regulations. The Georgia courts found it unnecessary even to deal with Petitioners' invalid arguments, as the Economic Regulations were simply inapplicable to the purely local flight.[2]

The Georgia courts which have considered this Georgia

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[2] Even if the Court had reached such arguments, the exclusion is specifically authorized by the Regulations. 14 C.F.R. §298.44 (h) (2). Further, there was no requirement that the policy be submitted to the Department of Transportation at any time. The only information given to the Department is that contained in CAB Form 257, which is a part of the record. R.395. 14 C.F.R. §298.41(a). Therefore, even if Petitioners' invalid arguments regarding applicability of the Economic Regulations were reached, the outcome would remain the same.

insurance contract correctly held that the Ecomonic Regulations contained in 14 C.F.R. §298 were not applicable. Those decisions, in accord with every decision from federal and state appellate courts on the question, were clearly correct.

REASONS FOR DENYING THE PETITION

The Decision Below Does Not Conflict With Any Other State Or Federal Decisions And Under Supreme Court Rule 17 There Are No Special Or Important Reasons For Granting Review.

This case meets none of the criteria set forth in Rule 17 of the Rules of this Honorable Court. The decision of the Georgia Court of Appeals is directly supported by decisions from other state courts of last resort and by decisions from the Federal Court of Appeals. The decision does not conflict with any decisions from this Court and is completely in accord with applicable federal aviation statutes and regulations.

As noted above, the Georgia Court of Appeals held that because the flight in question was purely an intrastate operation, the provisions of Part 298 of the Federal Air Regulations were inapplicable. That ruling is in accord with the decision of *every* appellate court that has considered the question and is directly mandated by the express terms of the regulations and the statute upon which they are based.

The Economic Regulations contained in 14 C.F.R. §298.1 (Part 298) are applicable only to one who is an "air carrier engaging in 'air transportation' as that term is defined under the [Federal Aviation] Act [of 1958, as amended]." "Air Transportation" is defined in the Act and in the Regulation itself as *"interstate,* overseas, and foreign air transportation." 49 U.S.C. §1301(10); 14 C.F.R. 298.2(c) [emphasis supplied]. Further, interstate, foreign and overseas air commerce are defined as "carriage by aircraft of persons or property for compensation or hire. . . in commerce between respectively — (a) a place in any State of the United

States or the District of Columbia, and a place in any other State of the United States or the District of Columbia . . ." 49 U.S.C. §1301(20). The insured, Air Carrier Express Services, Inc., was not an air carrier engaged in air transportation as defined by the Act during the flight in which the accident occurred, as the flight was wholly within the State of Georgia, and the entire intended flight path was wholly within Georgia. The Economic Regulations clearly were therefore *not* applicable to the accident flight, and the Georgia Court of Appeals correctly so held.

Dower v. United Airlines, Inc., 329 F2d 684 (9th Cir. 1964), is the only applicable federal appellate decision on point. There, the Ninth Circuit held that the Economic Regulations[3] do not apply to *intrastate* flights. As the Court noted:

> "Air transportation is defined in §101(10) of the Act, 49 U.S.C. §1301(10), to mean (as relevant here) 'interstate air transportation.'
>
> " 'Interstate air transportation' in turn is defined by §101(21), 49 U.S.C. §1301(21) to mean, in the context of this case, 'the carriage by aircraft of persons or property as a common carrier for compensation or hire. . . in commerce between (a) a place in any State of the United States or the District of Columbia, and a place in any other State of the United States or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof. . .'
>
> "The District Court ruled that a flight from San Francisco to Los Angeles did not fall within this definition. We agree." 329 F.2d 685.

The Ninth Circuit thus found that a particular local flight solely within the State of California by an air carrier, United

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[3] 14 C.F.R. §298 is a subsection of the Economic Regulations.

Airlines, Inc., which was otherwise generally involved in interstate air transportation, was not "interstate air transportation" under the Act and, thus, the Economic Regulations (in that case, 49 U.S.C. §1371)[4] did not apply. That is clearly the situation in the case at bar, as the Georgia Court of Appeals correctly ruled.

All state appellate courts which have considered the question are in agreement with the Georgia Court of Appeals on this issue.

As the Georgia Court of Appeals noted, a different division of the same court had stated that the requirements for insurance contained in the Economic Regulations were for "protection for bodily injury and property damage in the event of . . . interstate travel and to avoid CAB sanctions . . ." *Coren v. Puritan Insurance Co.*, 184 Ga. App. 667, 669, 362 S.E.2d 380 (1987) (emphasis supplied). In *Coren*, the Georgia Court of Appeals held that the endorsement added to the insurance policy to comply with Civil Aeronautics Board Regulations was nevertheless applicable to change the overall policy even though the flight in question was a local intrastate joy ride. Contrary to Petitioners' contention, *Coren* did not hold that the Regulations themselves were applicable to the local flight in question there.

In *Forum Insurance Co. v. Seitz Aviation, Inc.*, 241 Kan. 334, 737 P.2d 29 (1987), the Kansas Supreme Court held that Part 298 of the Economic Regulations applies only to interstate transportation and that the particular flight in question must be examined to determine whether it was interstate or intrastate in character.

In *Bonner v. United States Fire Insurance Co.*, 494 S.2d 1311 (La. App. 1986), the contention was made that the CAB Standard Endorsement, which was part of the policy pursuant to the

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[4] 49 U.S.C. §1371 is the statutory authority upon which all of the Economic Regulations, including Part 298, are based.

provisions of Part 298 of the Economic Regulations, created coverage. The flight in question originated in Louisiana with Texas as its destination and was therefore an interstate flight. However, the Court noted that the aircraft was not being used as an "air taxi," i.e. in transportation for hire, at the time of the flight and therefore the CAB standard endorsement was simply not applicable.

Bonner, Forum, and *Dower* demonstrate that the particular flight in question must be examined to determine whether the Economic Regulations are applicable. If it is not an interstate flight, carrying passengers or property for hire, then the regulations are simply not applicable, despite the fact that the operator holds authority to operate for hire with appropriate endorsements on his liability insurance coverage. Here the flight was wholly intrastate and therefore the Economic Regulations are not applicable.

Petitioners argue that *Braniff Airways,* 40 CAB 887 (1964), holds that a purely intrastate flight is subject to the Economic Regulations. A reading of that case shows such not to be true. Specifically, although Braniff contended that the proposed transportation was to be solely intrastate, the Board found otherwise. It stated, "the nearest approach to a true destination for passengers on such tours is the tour itinerary as a whole. On this basis *it is concluded that the nature of the movement is interstate transportation from various points in the United States to points within the State of Texas, including that portion of the tour operated by Braniff.*" 40 CAB 887. (Emphasis supplied.) Such is not the case here. Although petitioners make the loose allegation that one passenger on board came from out of state with the intention of making a parachute jump, there is no evidence that he was transported from out of state by Air Carrier Express Services itself or as part of an arrangement between Air Carrier Express Services and some other carrier. The fact is he was simply a person from out of state whose transportation to

the jump site had no involvement with Air Carrier Express Services, unlike the involvement of Braniff as described in the CAB opinion, *supra.*

This case in no way involves significant federal questions. Rather, it involves state law issues concerning interpretation of a contract of insurance issued in the State of Georgia to a Georgia insured and involving a purely intrastate flight.

CONCLUSION

The fundamental issue in this case is one of state law involving coverage of an insurance contract issued within the State of Georgia. Petitioners have attempted to raise a false issue of the applicability of the Federal Aviation Economic Regulations, but such alleged issue was correctly issued within the State of Georgia. Petitioners have attempted to raise a false issue of the applicability of the Federal Aviation Economic Regulations, but such alleged issue was correctly decided by the Georgia Court of Appeals in accordance with the clear provisions of the Federal Aviation Act and the Regulations issued thereunder, and in accordance with the decisions of all other appellate courts, federal and state, which have considered the question. There are no special or important matters or significant federal questions involved in this case, and the "review criteria" set forth in Supreme Court Rule 17 are not satisfied here.

Respondent respectfully prays that the Petition for Writ of Certiorari not be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sewell K. Loggins, a member of the Bar of this Court, hereby certify that I have served three true and correct copies of this Brief In Opposition To The Writ Of Certiorari, by hand, before the time of filing with the Clerk of this Court, upon:

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This 17 day of October, 1988.

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